1966

State of Utah v. Merlyn Clegg Starley : Respondent's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent,

vs.

MERLYN CLEGG STARLEY,
Defendant and Appellant.

Case No.
~~10363~~
10542

BRIEF OF RESPONDENT

Appeal from Judgment of the Third Judicial District Court of Salt Lake County
Honorable Aldon J. Andersen, Judge

PHIL L. HANSEN
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Attorney for Respondent

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BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent,

vs.

MERLYN CLEGG STARLEY,
Defendant and Appellant.

Case No. 19363

BRIEF OF RESPONDENT

STATEMENT OF NATURE OF CASE

The appellant, Merlyn Clegg Starley, was convicted of resisting an officer in discharge of his duty in violation of Section 76-21-54, Utah Code Annotated, 1953, in the District Court of Salt Lake County, State of Utah, and seeks by this appeal the review of that conviction.

DISPOSITION IN THE LOWER COURT

The appellant was charged in an information filed by the District Attorney of the Third Judicial District, State of Utah, with resisting an officer in the discharge of his duty. The case was tried before the Honorable Aldon J. Anderson, Judge, sitting with a jury. The jury returned a verdict of guilty to the crime as charged and the appellant was sentenced to be confined in the Salt Lake County Jail for a period of two months and to pay a fine of $200.00.

RELIEF SOUGHT ON APPEAL

The respondent submits the conviction should be affirmed.

STATEMENT OF FACTS

On June 12, 1965, Lt. Allen Sexton of the South Salt Lake City Police Department was making a routine patrol in an unmarked Dodge vehicle (R. 30-31). He observed a vehicle in the vicinity of Third West and 2700 South in Salt Lake City which was parked at the side of the road (R. 31). Officer Sexton, in the course of making a routine investigation, walked up to the right side of the vehicle, which was a white '64 or '65 Buick (R. 35). He observed that the vehicle contained two male occupants. There was a full moon and the area was well lit by lighting from the Roper railroad yards. The

windows on the car were partly down. Officer Sexton observed that the individual behind the driver's seat of the vehicle was laying against the individual who was the passenger and was performing an act of fellatio upon the passenger (R. 36). After Officer Sexton walked back to his car and radioed for assistance, he waited in his car and received no assistance, then got out and went back to the vehicle and observed that the passenger was then performing an act of fellatio on the driver (R. 37). Officer Sexton again went back to his car to await additional police assistance. The driver of the vehicle Officer Sexton had been observing got out of the vehicle, urinated, returned to the vehicle and started driving away (R. 3). Officer Sexton then turned on a bright spotlight and focused on the rear of the leaving vehicle. He turned on his siren but the vehicle did not stop (R. 38-39). He then attempted to crowd the vehicle off of the roadway which came to a dead end. Officer Sexton estimated that the vehicle went approximately 500 feet before it was stopped (R. 40-42). Officer Sexton approached the vehicle and the appellant got out of the vehicle. Officer Sexton identified himself as a police officer and indicated that the driver was under arrest for sodomy and disorderly person (R. 40-45). He displayed his identification to the appellant and asked the appellant and the passenger to get in the officer's vehicle (R. 45). The appellant indicated that he wanted to lock his car and Officer Sexton indicated that it was permissible. The appellant then got into his car, reached to the side, and then locked the car (R. 46).

The appellant got into the back seat of the vehicle and Officer Sexton started to make out a field arrest card, at which time the appellant raised his hand which contained Exhibit 1 (R. 47). The appellant had in his hand a capsule spray gun containing a fluid with caustic oils which he sprayed on the officer's head and in his face. He then threw the spray gun at the officer and attempted to wrestle with Officer Sexton (R. 48). Officer Sexton got loose and indicated that he would have to shoot the appellant if he did not behave, at which time the appellant kicked at the officer with his feet. The officer then struck the appellant on the foot with a flashlight and attempted to wrestle the appellant's feet down (R. 49). The appellant was finally handcuffed by the officer and appellant's co-participant, Raymond J. Templin. Officer Sexton asked the appellant why he had done what he had done and the appellant stated that he wanted to get away (R. 50). Officer Sexton noted that the appellant had apparently been drinking (R. 89).

Officer Kenneth G. Simpson responded to the call of Lt. Sexton and indicated that the spray gun was immediately below the door of Officer Sexton's vehicle (R. 60). He corroborated Officer Sexton's statement and testified that the officer had fluid on his face and that his eye was swollen. He further indicated that Mr. Templin's pants were not done up in the front and that the area was well lighted. He noted no bruises on the appellant nor torn clothing (R. 67). He further stated that there was evidence of the spray inside the

officer's car and that the appellant appeared to have been drinking (R. 87-88).

The appellant at the time of trial testified that he had met Mr. Templin at a cafe and had agreed to give him a ride home (R. 63-64). On the way home, he stopped his car because of a pressing need to urinate, but indicated that he remained talking approximately 10 minutes before he got out of the car. He indicated that as he started up, he did see the light, but there was no siren and that when he stopped his car, he further said, that Officer Sexton, who was dressed in plain clothes, came over to him in an aggressive fashion (R. 65). He indicated that the officer never identified himself and claimed that the officer attempted to hit and beat him (R. 66). He denied engaging in any sodomy (R. 68). It appeared that the home of Mr. Templin was approximately two blocks from where the appellant stopped his vehicle (R. 70).

Mr. Templin, a student at Hollywood Beauty College (R. 79), indicated that Officer Sexton was the aggressor. He said that he had met the appellant that evening in a cafe (R. 79-86). Mr. Templin was called as a witness on behalf of the State (R. 77). He testified that at the time he and the appellant were parked on 2700 South, they were discussing the Central City Opera in Denver, Colorado (R. 80). Mr. Templin, in response to the prosecution's questions, indicated that he did not commit an act of sodomy nor had an act of sodomy committed upon him (R. 80). At that time, the prosecution

presented an exhibit and asked Mr. Templin to examine it to determine if it refreshed his memory (R. 80), the following then occurred:

"Q. I show you what will be marked as Exhibit 8. I show you Exhibit 8, Mr. Templin, and ask you to read that and see if that refreshes your memory as to what occurred on this occasion?

MR. McMULLIN: Your Honor, I would like to make an objection at this time and voir dire the witness to substantiate my objection.

THE COURT: Well, voir dire on what?

MR. McMULLIN: I believe this was obtained under duress, this statement.

THE COURT: It hasn't been offered in evidence.

MR. McMULLIN: But he is asked to read the statement.

THE COURT: That's right. He may read it.

Q. (By Mr. Winder) Is that your signature at the bottom of Exhibit 8?

A. Yes, it is.

Q. Are these your initials in the body of Exhibit 8?

A. Yes.

Q. And did you see Officer Kenneth Simpson and Al Sexton sign Exhibit 8?

A. Yes, I did.

Q. Did you read this statement prior to the time you signed Exhibit 8?

A. He wrote it out and told me to read it and sign it. He never told me I didn't have to sign it and he never told me I could see a lawyer. I thought I had to sign it so I signed it.

Q. I am asking you Mr. Templin if this statement refreshes your memory as to what occurred on that night?

A. That statement is not true.

Q. Why did you give that statement?

A. I didn't give it. Mr. Sexton through his own vicious mouth took it down. I never once said that what he had written down was correct. He wrote it from his own mind and told me to read it and sign it.

Q. And you did write it and sign it?

A. Yes.

Q. And you say this is not a correct statement of what occurred?

A. That's right.

Q. Why did you sign it?

A. To be very honest, I was scared. I have never been arrested in my entire life. I wasn't — I didn't read it — I must have read it three times and didn't really read the words on the paper.

Q. Had you told Officer Sexton what occurred prior to the time he wrote out the statement?

A. I don't understand what you mean.

Q. Did Officer Sexton ask you what occurred on this night?

A. He asked me questions; I answered them and from his own definitions wrote that statement.

Q. And what you stated in this statement or what he wrote down is what you told Officer Sexton?

A. No, that's what he just wrote down, what he said.

Q. Did he make up the statement in Exhibit 8 that you were in the Radio City Lounge?

A. Yes.

Q. Didn't you tell him you were in the Radio City Lounge?

A. I told him I had been there.

Q. Was it correct that you left the Radio City Lounge at approximately twelve o'clock?

A. I don't know what time it was. I stopped in for two beers — two or three and left.

Q. Did you tell him that when you started to leave at approximately midnight Mr. Starley offered to drive you home?

A. No, sir.

Q. He made that up, is that correct?

A. I met Mr. Starley at the cafe and he said, 'Do you have a way home?' I said, 'No, I'm taking the bus,' and he said, 'I'll give you a lift.'

Q. And when you say in this statement that you two —

THE COURT: Mr. Winder, I think I should indicate that the questions at the present appear to the Court to go beyond refreshing memory."

During the course of examination of Mr. Templin, no objection was raised to the questions asked. The witness' statement (Exhibit 8) was never offered into evidence, and the only evidence presented before the jury was that the content of the statement was with reference to the Radio City Lounge (R. 82, L. 21 and 22). However, the witness did immediately thereafter admit that he had told Officer Sexton that he had been in the Radio City Lounge.

Both Officer Sexton and Officer Simpson, in rebuttal, testified that the appellant told them he had met Mr. Templin in the Radio City Lounge in Salt Lake City.

Based on the above evidence, the jury returned a verdict of guilty.

ARGUMENT

POINT I.

THE TRIAL COURT COMMITTED NO ERROR WITH REFERENCE TO THE PROSECUTION'S EXAMINATION OF MR. TEMPLIN SINCE (A) NO PROPER OBJECTION WAS RAISED BY COUNSEL TO THE QUESTIONS OF THE PROSECUTION, (B) THE PROSECUTION ONLY ASKED MR. TEMPLIN TO EXAMINE HIS STATEMENT AS TO WHETHER IT RE-

FRESHED HIS MEMORY, AND (C) THERE WAS NO PREJUDICE TO THE APPELLANT.

The appellant contends that the examination of Mr. Templin by the district attorney was error. The appellant contends that the district attorney cross-examined Mr. Templin on his statement given at the South Salt Lake City Police Department when the statement was involuntary.

It is submitted that the issue has not been preserved on appeal. At the time Mr. Templin took the stand, the district attorney asked him if he had engaged in a homosexual or sodomous relationship with the appellant. He replied "no." Thereafter, the district attorney merely handed Exhibit 8 to the witness and asked the witness if this refreshed his recollection. At that time, counsel for the appellant raised an objection which the court noted was premature. The court advised appellant's counsel that the district attorney had merely asked the witness if the statement refreshed his recollection. At that time, there was no claim of coercion or duress and no effort to examine from the statement. The district attorney merely asked questions relative to the recollection of the witness. No further objection of any kind was raised by the appellant to the actions of the district attorney.

It is well settled that the failure to raise an objection where the opportunity is afforded prohibits the

claim of error on appeal. Thus, in Abbott, Criminal Trial Practice, sec. 348, it is stated:

> "It is a general rule that, in order to take advantage of the admission of evidence by the trial court as error and to secure a reversal of its judgment upon appeal, the evidence must be objected to in the trial court. Likewise where no objection is made to cross-examination, neither the propriety thereof, nor the competency of the testimony brought out thereby may be questioned on appeal."

Since the appellant raised no proper objection in the trial court to any actions of the district attorney, there can be no basis to claim error for the first time on appeal. It should be noted that no motion to strike was made and that the court, itself, restricted the actions of the district attorney when they may have gone beyond the scope of reasonableness. Any error that might be claimed from this issue has been waived.

It is submitted that there was no cross-examination of Mr. Templin from his statement. The actions of the district attorney as set forth on pages 6-8 infra, show merely that the district attorney offered the statements to the witness and asked if it refreshed his memory. He merely asked a few questions relative to the witness meeting the appellant at the Radio City Lounge, which the witness admitted. There was no persisted cross-examination into the substance of the statement nor was there an offering of the statement into evidence. The substance of the statement was never put before

the jury and the only testimony from the witness w... his denunciation of the conduct of the South Salt La... City Police. Consequently, the issue which the appell... attempts to raise in this appeal is not factually pres... the court.

The appellant claims that the decision in *People ... Hiller,* 2 Ill. 2d 323, 118 N.E.2d 11 (1954), suppo... his contention that reversal is in order. That case ... substantially inopposite to the instant case. The co... noted what had, in fact, occurred:

> "The statement taken by the police was n... introduced into evidence nor was the officer ... whom it was given called as a witness; however, ... when Liljeblad was cross-examined, the State ... Attorney was permitted to read certain of t... questions and answers from the statement and ... to ask the defendant if the questions had been ... put to him and if he had made the answers. Whe... this mode of cross-examination was first pursued ... and several times thereafter, defendants' counse... objected to any reading from the statement on ... the ground that it had been given under duress. ... In response to one question and answer read ... him, Liljeblad made this reply: 'I did make the ... answer but it was a forced statement. I did n... want to make that statement,' and in another ... instance he stated: 'I had to submit to that an... swer.' The court, however, overruled counsel's ... objections and admitted the passages from th... statement in evidence without inquiring into ... voluntary or involuntary nature. Defendant ... now contend that this action of the court consti... tutes reversible error."

Clearly, this case is distinguishable. First, there was no adequate objection raised by counsel. Second, there was no reading from the statement or questioning which disclosed the contents of the statement. Third, reference to the statement was made for refreshing recollection alone. Fourth, no part of the statement went before the jury, except the part relating to the Radio City Lounge meeting, which the witness in part admitted.

In *Morton v. Hood*, 105 Utah 484, 143 P.2d 434 (1943), the court observed:

> "We are of the opinion that when a witness has made statements on a prior occasion which would induce counsel acting in good faith to call such person as a witness, and when testifying such witness gives testimony materially different from the prior statement; the party so surprised and misled by such adverse testimony, under proper circumstances, should not only be permitted to ask leading questions to refresh the recollection of the witness as to the prior declarations, but if the witness asserts that such questions or reference to alleged prior declarations do not refresh his memory, or he denies making such statements, or refuses to answer, or even professes that he is unable to remember; proof of such prior statements should be received, not as substantive evidence of the facts about which such statements were made, but to offset the effect of the surprise adverse testimony."

The actions of the district attorney in the instant case were the same as those the court indicated were proper in the Morton case.

Several federal cases have acknowledged that a witness who takes the stand and testifies contrary to what previous information of the prosecution would lead to believe that the witness would testify warrants allowing the witness to be impeached or his recollection refreshed by evidence even though the evidence was illegally obtained. *Tate v. United States*, 383 F.2d 377 (D.C. Cir. 1960); *Walder v. United States*, 347 U.S. 62 (1954). Although these cases do not touch directly on the question of the use of a statement claimed to have been obtained by coercion, they do recognize that the prosecution must be given some allowances in its efforts to ascertain the truth in the face of inconsistent positions taken by a witness. Clearly, where the prosecution has limited its approach to refreshing recollection and no part of the statement, except that actually admitted by the witness, is received for consideration by the jury, it cannot be said that such actions are prejudicial. In *Ercoli v. United States*, 131 F.2d 354 (D.C. Cir. 1942), it was observed:

> "This results from the fact that, although appellant objected to the challenged testimony when it was first offered and, again, by his motion for a directed verdict, at the close of the Government's case, nevertheless he then proceeded to the presentation of his own case and testified in his own behalf to most of the same facts as those which appear in his statements to the officers. His testimony thus constituted a judicial admission and operated as an express waiver, with the same effect as an admission made in a pleading or in a stipulation."

It is submitted, therefore, that the posture of the instant case does not truly reach the question of impeachment of a witness by the use of a witness' statement, which is claimed to have been obtained by duress.

Finally, it is submitted that the incident of which the appellant protests could hardly be deemed prejudicial. The trial court, itself, cut the district attorney off when he felt he was going beyond the limitations allowed in refreshing recollection. The only part of the statement which presented facts to the jury related to the Radio City Lounge which was partly admitted by the witness. It is apparent, from a full examination of the record, as against the action appellant contends was error, that there was no prejudice.

POINT II.

THE DISTRICT ATTORNEY DID NOT IMPEACH HIS OWN WITNESS NOR ATTEMPT TO DO SO. BUT EVEN IF HE HAD, IT WAS PERMISSIBLE IN VIEW OF THE PRIOR INCONSISTENT STATEMENT OF THE WITNESS.

The appellant contends in the second point of his brief that the court erred in allowing the prosecution attorney to impeach his own witness under the guise of refreshing his memory. At the outset, it is submitted that this issue is not before the court on appeal. At no time during the course of the trial did appellant in any

way object or contend that the district attorney
impeaching his own witness. At no time was there
allegation made in the trial court to the effect that
district attorney in attempting to refresh recollec
was, in fact, impeaching his own witness. Under th
circumstances, as noted in the previous point, there
no proper issue before this court and the matter may
be considered for the first time on appeal.

It is submitted that the actions of the district attor
ney did not amount to impeachment. The district attor
ney called Mr. Templin as his own witness. Howeve
it must be acknowledged that the witness was adver
Indeed, the witness was the co-participant of the appe
lant in the act of fellatio which precipitated the appe
lant's arrest and the subsequent resistance by the ap
pellant. Consequently, it is submitted that even though
the witness was not called by the appellant and w
called by the prosecution and even though the witne
was not a party, he was, in fact, an adverse witnes
Further, it should be remembered that the witness ha
previously given a statement to police officers. The exa
contents of the statement are not now before the cour
but it might be assumed that there was certainly evi
dence in the statement which would have justified th
district attorney in asking the witness to refresh hi
recollection. The district attorney did not attempt t
impeach the witness by showing a contradictory state
ment, but, rather, merely requested the witness to re
fresh his recollection. This is a perfectly permissible
action.

Thus, in McCormick on Evidence, page 71 (1954), it is stated:

> "The principal impact of the common law prohibition, then, is in preventing impeachment by previous contradictory statements. The principal means of escape from the prohibition, where it still persists, is by resort to questioning of the witness by the calling party about the previous statement not avowedly to discredit but to refresh his memory, or as it is sometimes more urgently phrased, 'to awaken his conscience'."

This rule has been supported by this court in *Morton v. Hood*, supra, and by several other cases. *People v. Michaels*, 335 Ill. 590, 167 N.E. 857 (1929); *Meyerson v. State*, 181 Md. 105, 28 A.2d 833 (1942); *Bullard v. Pearsall*, 53 N.Y. 230, 231 (1873). See also Wigmore, Evidence, 3d ed., sec. 905.

The trial court was very careful in making certain that the district attorney did not go beyond the stage of refreshing the witness' recollection and did, in fact, arrest the examination at a stage which the trial court felt might be going beyond the refreshing of recollection. Consequently, it is submitted that impeachment did not, in fact, occur; and, consequently, the claim that the prosecution impeached its own witness is not properly before the court.

The appellant cites the case of *State v. Leek*, 85 Utah 531, 39 P.2d 1091 (1934). That case is substantially different in posture than the instant case. There, a written statement impeaching the prosecution's wit-

ness was, in fact, admitted. Further, it appeared th the actions of the district attorney were caculated, rath than based upon the testimony of the witness. It is sub mitted, therefore, that the Leek case is not precede for the instant case. Further, as noted in Wigmor supra, sec. 903, there has been a substantial liberalizati of this rule in Utah based upon the very excelle opinion of Justice McDonough in *Morton v. Ho* supra (Wigmore, supra, 1964 pocket supplement, p 157). See also *Hatch v. Garrett Freight Lines, In* 1 Utah 299, 265 P.2d 1007 (1959).

The case of *State v. Herrera*, 8 U.2d 188, 330 P.2 1086 (1958), bears no resemblance to the situation i the instant case. There, the district attorney cro examined a witness on matters of character which we not permissible since they involved arrests or charge etc. Further, the jury was allowed to interrogate th witness well beyond the limits of propriety. The case i notably irrelevant to the instant issue. The case o *People v. Zemmora*, 66 Cal. App. 2d 166, 152 P.2d 18 (1944), is equally inapplicable under the present fac situation, as a simple reading will disclose.

Further, it is submitted that even were this cour to characterize the relatively innocuous conduct of th district attorney as tantamount to impeachment, it woul be justifiable under the present fact situation. The state ment of the witness would appear to have been contr dictory to what his expected testimony must have bee when the prosecution called him as its witness. In th

situation, it is perfectly permissible to impeach the witness. *State v. Inlow*, 44 Utah 485, 141 P.2d 530 (1914); *State v. Terseder*, 66 Utah 543, 244 P.2d 654 (1926).

Consequently, it was proper for the district attorney to at least attempt to refresh the recollection, and even to some extent, impeach the witness. As Wigmore notes in sec. 904(7):

> "(7) Still another hybrid form of the rule allows the question to be put to the witness, primarily to refresh recollection (as in one preceding form) or frankly to discredit (as in another); but it allows outside testimony to be offered in case the witness *proves hostile.*"

Finally, the respondent submits that the time has come to reject outright the rule prohibiting a party from impeaching his own witness. The rule is predicated upon nothing more than historical grounds based on the old prohibitions at common law against contradicting the oath of an oathtaker. Wigmore, supra, sec. 896. The scholastic authorities are relatively uniform in contending that a party should be allowed to impeach his own witness if it will aid in the ultimate presentation of truthful evidence. McCormick, supra, sec. 38; Wigmore, supra, secs. 896 through 918. Both the Uniform Rules of Evidence, Rule 20, and the Model Code of Evidence, Rule 106, reject the previous restrictions on impeaching one's own witness.

In the instant case, it is submitted that the facts do not disclose impeachment, that if impeachment oc-

curred, it was proper in view of the nature of the ness, including his position of adversity and the pre statement he gave.

Finally, it is submitted that as noted in Point I, there could be no prejudicial error from the action the court acted swiftly to confine the examinatio proper bounds and no proper objection was taken.

POINT III.

THE TRIAL COURT DID NOT COMMIT ERROR BY ALLOWING THE PROSECUTION TO OFFER EVIDENCE OF OTHER POSSIBLE CRIMES.

The final point in the appellant's brief is a conte ton which is extremely ambiguous and most indefinite- that the trial court allowed the prosecution to offer e dence of other crimes. There is no merit to this positi If the appellant is concerned with the question of t sodomy or alleged fellatio activities of the appella they were directly relevant to the validity of the arr the officer made. Since an essential element of the cri of resisting arrest is that the arrest be valid, the offe or conduct surrounding the alleged offense for wh the person resisting was arrested is directly relevant was incumbent upon the prosecution to show that Offic Sexton in making the arrest had reasonable cause believe that a felony had been committed or that a cri had, in fact, been committed in his presence. The c

cumstances surrounding the conduct of the appellant and his co-participant were, therefore, directly relevant.

The case of *State v. Kasda*, 14 U.2d 266, 382 P.2d 407 (1963), bears no relationship or relevance to the instant case. It is well settled that other crimes of a defendant may be shown where they are offered not to show the bad character of the appellant but are otherwise relevant to matters at issue. *State v. Lyman*, 10 U. 2d 58, 348 P.2d 340 (1959); *State v. Neal*, 123 Utah 93, 254 P.2d 1053 (1953). Where the proof of the commission of another offense is an essential ingredient to the offense charged, the court in no way commits error by allowing that evidence to be shown.

Finally, there was no objection raised by the appellant at the time of trial and the issue is not preserved on appeal.

CONCLUSION

The facts in the instant case unmistakably show that the appellant was guilty of the offense charged. The record on appeal in the instant case shows a total absence of any prejudicial error or other action which would warrant reversal by this court.

This court should affirm.

Respectfully submitted,

PHIL L. HANSEN
Attorney General

Attorney for Respondent